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No. 625

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

AERONAUTICAL RADIO, INC., ET AL., *Petitioners*

*v.*

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 31, 1959

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*v.*

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on November 13, 1959.

### OPINIONS BELOW

The opinion of the Court of Appeals (reprinted *infra*, pp. 1a-21a), not yet officially reported, is unofficially reported at 19 Pike & Fischer Radio Reg. 2006

* Aeronautical Radio, Inc., Air Transport Association of America, Bendix Aviation Corp., Pan American World Airways, Inc., Trans World Airlines, Inc., and United Air Lines, Inc.

(1959). The opinions of the Federal Communications Commission (JA 13-45, 182-198),* not yet officially reported, are unofficially reported at 17 Pike & Fischer Radio Reg. 1505 (1958) and 17 Pike & Fischer Radio Reg. 1587 (1958).

## JURISDICTION

On July 31, 1958, the Federal Communications Commission denied timely filed petitions for reconsideration of its ex parte frequency reallocation order publicly released on April 18, 1958. Petition for review was filed in the United States Court of Appeals for the District of Columbia Circuit on September 29, 1958, by these petitioners pursuant to 47 U.S.C. § 402(a), 5 U.S.C. §§ 1032, 1034 and 5 U.S.C. § 1009. On November 13, 1959, the Court of Appeals, after consideration of briefs and oral argument heard on May 25, 1959, affirmed the order of the Commission. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

The Court of Appeals upheld an ex parte rule-making action by the Federal Communications Commission which amended the international allocation of the frequency 8800 mc/s for worldwide use in the "radionavigation" service and reallocated this frequency to a non-navigation service called "radiopositioning." The Commission's action was in response to a request from the Office of Civil and Defense Mobilization and in reliance upon determinations made by OCDM as set forth in a classified communication to the Commission. This classified document, the sole motivation for the

* References are to the pages of the joint appendix in the Court of Appeals.

Commission's action, was not reviewed by the court in arriving at its decision and was not made available to these petitioners.

Accordingly, the questions presented are:

(1) Whether the Commission's rule-making powers authorize it to change the allocation of the radio spectrum among radio services as set forth in a radio treaty to which the United States is a party;

(2) Whether the Commission's rule-making responsibility is satisfied by its acceptance of determinations made by OCDM without formulating an independent judgment on the considerations of the public convenience, interest or necessity;

(3) Whether petitioners' right of review may be defeated, thus rendering the Commission's action unassailable, by the interposition of a claim that the record motivating the action is classified and hence privileged.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Communications Act are reprinted *infra*, pp. 22a-23a.

## TREATY PROVISIONS INVOLVED

The pertinent treaty provisions are reprinted *infra*, pp. 24a-26a.

## STATEMENT

On April 16, 1958, the Federal Communications Commission adopted an extraordinary and unprecedented rule-making order summarily changing the allocation status of some fourteen bands of the radio spectrum totalling 2800 mc/s. Caught in the sweep of this omnibus action was a 100 mc/s frequency band centered on 8800 mc/s, which the Commission's order changed

from "radionavigation" to a non-navigation service called "radiopositioning." This action, taken in secret upon a classified request from OCDM dated April 11, 1958, was made effective forthwith. Two days later, on April 18, 1958, notice of the Commission's action was publicly released. (JA 13)

This order stated that on April 16th the Commission had "before it for consideration the reallocation of the frequency bands" requested by the Office of Civil and Defense Mobilization which had made "representations that the reallocations * * * are required either because of vital national defense considerations or are desirable changes incident thereto." (JA 14-15).

The Commission's withdrawal of the frequency 8800 mc/s from the "radionavigation" service disrupted an industry program for the installation of a new doppler radionavigation device then being developed for use in jet airtransports. At the time of the Commission's action, major electronic and air-frame manufacturers and trunk-line air carriers were in the advanced phases of producing and installing 8800 mc/s doppler navigators. Licenses were being issued by the Commission for the operation of these doppler navigators.

Under the "Table of Frequency Allocations" set forth in Chapter III of the Atlantic City Radio Regulations,[1] the frequency 8800 mc/s is allocated to "radio-

[1] International Telecommunication Convention, Atlantic City, and International Radio Regulations, Atlantic City, T.I.A.S. No. 1901 (1947). The Atlantic City Convention was superseded by the Buenos Aires Convention, T.I.A.S. No. 3266 (1952), which carried forward the Atlantic City Radio Regulations. An International Radio Conference concluded in Geneva, Switzerland, on December 21, 1959, has adopted revised regulations which will come into force on May 1, 1961.

"Allocation" is a word of art in radio regulation and refers to

navigation" on a worldwide basis. (*infra*, p. 26a) No provision is made for the assignment of this frequency to "radiopositioning" stations and any assignment in derogation of the "radionavigation" allocation can be made only on the express condition that harmful interference shall not be caused to stations operating in the "radionavigation" service. (*infra*, pp. 24a-25a) As a result of the Commission's order, save for a limited period, private users such as petitioners must evacuate this band and during the interim must accept harmful interference from government "radiopositioning" stations not operating in accordance with the convention and applicable regulations. (JA 24) In short, the Commission's action withdrew this band from the public domain, even for treaty-authorized radionavigation devices, by acceding to OCDM's effort to requisition this band for government stations exclusively.

The Commission's action was protested by adversely affected persons, including petitioners, who filed timely petitions requesting the Commission to reconsider its order and to hold a hearing on the matters set forth in the several petitions. In addition to procedural deficiencies under the Communications Act and the Administrative Procedure Act, the order was challenged as being contrary to the Atlantic City Radio Regulations and not representing the Commission's

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the division of the radio spectrum among the various classes of radio services, *e.g.*, "radionavigation" and "broadcasting." This division of the radio spectrum among radio services from 10 kc/s to 10,500 mc/s is set forth in the "Table of Frequency Allocations" of the Atlantic City Radio Regulations. The term "allocation" is to be distinguished from the term "assignment" which involves the process of licensing particular stations to use particular frequencies.

own judgment that its action was in the public interest. (JA 47)

On July 31, 1958, the Commission released an order denying in all respects the relief requested. (JA 182) The Commission stated again that the "changes were brought about as a result of a request by" OCDM and declared that its decision "to adhere to the position taken in its April 16 action is based solely on national defense considerations." (JA 183, 193) Petitioners' request for a hearing was dismissed for the reason that it would "serve no practical purpose." (JA 186)

The Commission also confirmed that it accepted the representations made by OCDM at face value and denied its statutory responsibility to assess and determine independently the merit in the public interest of OCDM's request and accompanying representations. In the Commission's opinion, it was sufficient that "ODCM has determined" its frequency requirements. (JA 190) In addition, the Commission noted that the actual assignment of government stations in the reallocated frequency bands would be made by the President under Section 305 of the Communications Act as that provision exempts government-owned stations from FCC licensing. (JA 188)

Upon review, the Court of Appeals affirmed the Commission's order but significantly extended the Commission's legal theory. According to the Commission, its order was the result of a coordinated pooling of administrative and executive decisions. (FCC Br. p. 23) But in the court's view of the case, "National trust and responsibility must be reposed somewhere and in this situation, by Section 305 of the Communications Act and otherwise, they are centered in the

President with all his vast power. He is the Commander in Chief." (*infra*, p. 12a) In this connection, the court stressed: "[t]hat the national emergency declared in Proclamation No. 2914 has occasioned continued and still present concern is public knowledge." (*infra*, pp. 12a-13a)

Approving the Commission's acceptance of OCDM's representations without an independent evaluation in the public interest, the court "fail[ed] to see how the Commission had any other alternative" open to it and "concluded that the exercise of the prerogative of and by the Executive must control." (*infra*, pp. 17a, 21a) The court acknowledged the "possibilities of abuse," but was "satisfied that the Commission, confronted by the demands of the Executive for exclusive use of the frequency in question, had thus undertaken to do whatever was reasonably open to it in the light of national defense needs." (*infra*, pp. 11a, 16a)

As to the order's conflict with the international table of allocations, the court declared that "the Commission pursuant to the exercise of the prerogative of the Executive correctly conformed its Rules to accommodate the national defense requirements as the Convention permitted." (*infra*, p. 9a)

In addition to disposing of the issues adversely to petitioners, the court declined to review or make available to the parties a classified portion of the record as to which a claim of privilege had been filed. (*infra*, pp. 20a-21a)[2] Notwithstanding petitioners' conceded right of review, the court was "satisfied that the claim of privilege must be honored." (*infra*, p. 21a)

[2] At the instance of these petitioners, the classified portion of the record, omitted from the Commission's initial record certification, was transmitted to the court under seal. *Ibid.*

## REASONS FOR GRANTING THE WRIT

### A. The Commission Exceeded Its Authority by Making Frequency Allocations Contrary to a Radio Treaty to Which the United States is a Party.

The International Radio Regulations are a concrete expression of the necessity that "the primary allocation of frequencies is now made by international treaty or other agreement."[3] This "primary allocation of frequencies" is basic and fundamental to rational administration of the radio spectrum. Thus, while the domestic interstices of radio regulation remain subject to the full regulatory impact of the Communications Act, the FCC's action must not only be within the scope of its statutory powers, but must also conform with the allocations and regulations made by international agreement.

The Court of Appeals' decision seriously impairs orderly regulation of the radio spectrum by placing treaty allocations in jeopardy of repudiation by unilateral action of the Commission. The opinion below misconceived the scope and significance of the international allocation table and the interference protection granted to primary assignments made under those allocations. The court not only approved the Commission's reallocation in direct conflict with the international table of allocations, it also sanctioned the Commission's subjection of stations operating in accordance with the convention and applicable regulations to harmful interference from stations not operating conformably thereto.[4] If the Commission may assume

[3] FCC, 15th Annual Report To Congress 23 (1949).

[4] In addition to the presently licensed civilian doppler installations, in excess of 1000 military installations must be abandoned or must accept the harmful interference attending the FCC's private allocation scheme.

that power, radio treaties become porous documents indeed creating only the illusion that this important communications medium will be rationally exploited. Congress certainly did not intend to place radio treaties in such a vulnerable position and thereby throw the development of radio back to the chaos, universally decried as "intolerable," which the Communications Act was designed to remedy.[5]

Both the Communications Act and the Constitution forbid such a holding.[6] "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress." *Regents v. Carroll*, 338 U.S. 586, 597-98 (1950). And in this instance, the Congressional mandate conditions the validity of Commission actions on being "not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty * * * to which the United States is * * * a party." Section 303(r); 47 U.S.C. § 303(r). (full text *infra*, p. 23a) Not only is the Commission expressly charged with the implementation of radio treaties, but above all, the Constitution declares them to be "the supreme law of the land" which no administrative body can override. Const. Art. 6, Cl. 2.[7]

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[5] See *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-13 (1943).

[6] Thus, ODM, one of OCDM's predecessors, "pointed out" in a classified report in 1956 that the government "could not, by itself, change frequencies fixed by domestic and foreign shipping services and airlines since they are used under international agreement." FCC Public Notice 30856 (April 13, 1956).

[7] Cf. *Power Authority of New York v. Federal Power Commission*, 247 F. 2d 538 (D.C. Cir. 1957), *vacated and dismissed as moot*, 355 U.S. 64 (1957).

The broad warrant granted the Commission by the Court of Appeals presents an important issue meriting review by this Court. This extremely important communications medium is jeopardized if the FCC may impress its ad hoc judgments on the allocations framework negotiated by the international radio community. For radio "transmissions know no state or national boundaries and must be controlled among the users to prevent interference and waste of frequencies. The international aspect of radio has developed to such an extent that almost no major frequency allocation can be met properly without considering international usage.'" The case at bar underscores the public importance of this issue because here the development of critically needed radionavigation devices suffered a serious setback that can be ill afforded in the jet age.[7] The court's decision can only undermine public confidence in the stability and reliability of radio allocations which are obviously indispensable to the continued development of radio in the public interest.

**B. In Ratifying the Reallocation Contrary to the Communications Act, the Court of Appeals Evolved a Novel Doctrine of Unbridled Presidential Powers That Upsets the Regulatory Scheme Enacted by Congress.**

Exercising its undoubted power to regulate commerce, "the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host" of problems concerning the development of

[6] FCC, 15th Annual Report To Congress 23 (1949).

[7] As the court itself perceived, the "development of aeronautical radionavigation equipment to its utmost efficiency [goes] hand in hand" with our expanding air traffic. (*infra*, p. 18a)

radio. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933). This comprehensive scheme contains few exceptions and such as there are are "limited" and "technical in nature." *E.g.*, state regulation of common carrier operations, cf. *Benanti* v. *United States*, 355 U. S. 96, 105 (1957), or the exemption of certain government-owned radio stations from Commission licensing. Section 305; 47 U.S.C. §305. (full text *infra*, p. 23a) Conversely, Section 305 confines the President's authority to the assignment of frequencies for "stations belonging to or operated by the United States." But the authority for allocating frequencies within the framework of international allocations resides with the Commission where Congress has clearly and abundantly placed it. Section 303(c), 47 U.S.C. § 303(c). (full text *infra*, p. 22a)

The court below went far beyond the Commission's *post litem motam* justification for its allocation order by evolving the unprecedented theory that "the President acting in his Constitutional capacity" and "the prerogative of the Executive" "with all his vast power," in light of the "national emergency declared in Proclamation No. 2914," may preempt the radio spectrum. (*infra*, pp. 9a-10a, 12a-13a)[10] However broadly Section 305 of the Communications Act, exempting government-owned stations from the Commission's licensing function, and Section 606, authorizing presidential seizure of existing communications facilities during time of war, may be interpreted, there is no grant stemming either from an act of Congress or

[10] The Commission urged that by reason of Section 305 of the Act it and the President can make assignments "irrespective of the use made of them by the other." (FCC Br. p. 23)

from the Constitution itself authorizing the presidential seizure of frequencies.[11] Indeed, the court below has resurrected the aggregate theory of presidential powers in time of emergency repudiated by this Court in the *Steel Seizure* case—where, as here, Congressional enactments were bypassed for reasons of expediency. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Moreover, this unwarranted theory is disproved by the record which, in fact, preserves the FCC's understanding in April when the reallocation was first announced that "the Commission has before it for consideration the reallocation of the frequency bands indicated." (JA 14) In the view of the Court of Appeals, this contradiction was remedied by "presuming" that when OCDM "made representations" to the Commission it was actually reallocating frequencies for the President. (*infra*, p. 9a) For this result, the court cited Executive Order No. 10460[12] authorizing OCDM to "assist and advise" the President in the performance of his functions under Section 305 of the Act.[13] (*infra*, p. 10a) Inexplicably, the court

[11] Furthermore, whenever Congress intended the President to possess authority to dictate the decisions of its chartered instrumentalities, it legislated in precisely those terms. See, *e.g.*, *C. & S. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948); and cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958).

[12] 3 Code Fed. Regs. 947 (Comp. 1949-53). Section 4 of which provides that "Nothing in this order shall be deemed to impair any existing authority or jurisdiction of the Federal Communications Commission." *Ibid.*

[13] In no event is this Section of the Act broad enough to cover what was done here and certainly the President could not have conferred authority in excess of that granted him by Congress. Cf. *Cole* v. *Young*, 351 U.S. 536 (1956).

just disregarded Executive Order No. 10705[14] which delegates to OCDM the President's authority under Section 305 "*only* during the continuance of a war in which the United States is engaged." (emphasis added) But like independent agencies, executive agencies "are not free to ignore plain limitations on [their] authority" and "[n]othing short of explicit Presidential action could justify a conclusion that the limitations on [OCDM's] powers had been eliminated." *Peters* v. *Hobby*, 349 U.S. 331, 345 (1955). There has been no such action by the President.[15]

Bureaucratic lawlessness has been substituted for the balanced mechanism forged by Congress providing for the interplay of Commission, international and presidential administration of the radio spectrum. The resulting regulatory imbalance warrants plenary resolution by this Court as the problems of accommodating competing demands on the radio spectrum become of mounting public concern.

### C. The Commission Did Not Exercise Its Own Independent Judgment to Find That the Frequency Reallocation Was in the Public Interest; But, on the Contrary, Deferred to the Judgment of OCDM.

The Communications Act establishes a pervasive regulatory scheme "to secure the maximum benefits of radio to all the people of the United States" and entrusts the Federal Communications Commission "with comprehensive powers to promote and realize

[14] 3 Code Fed. Regs. 63 (Supp. 1957).

[15] Even OCDM agrees that this delegation "may be exercised *only* during the continuance of a war in which the United States is engaged." Defense Mobilization Order IX-4, 32A Code Fed. Regs. § 2(1) (Supp. 1959). (emphasis added)

the vast potentialities of radio."[18] Title III of the Act directs the Commission to "generally encourage the larger and more effective use of radio in the public interest" and vests the Commission with authority to "[a]ssign bands of frequencies to the various classes of stations, and assign frequencies for each individual station." Section 303(c)(g); 47 U.S.C. § 303(c)(g). (full text *infra*, pp. 22a-23a). Section 1 of the Act grants to the Commission authority to regulate wire as well as radio communications both "for the purpose of the national defense" and "for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies." 47 U.S.C. § 151. (full text *infra*, p. 22a). To these ends, the Commission is charged with making rules and regulations as the "public convenience, interest, or necessity requires" "to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations * * * to which the United States is * * * a party." Section 303(r); 47 U.S.C. § 303(r). (full text *infra*, p. 23a).

The opinion of the Court of Appeals perverts the statutory plan and directly conflicts with the decision of this Court in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), interpreting the Act to mean that the Commission's discharge of its statutory responsibilities must rest "on its own evaluation" and "on its independent conclusion" as to the public interest. *Id.* at 94-95. While

[18] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943). See also *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933); *Regents* v. *Carroll*, 338 U.S. 586, 598 (1950); *Benanti* v. *United States*, 355 U.S. 96, 104 (1957); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 529 (1959).

acknowledging "the depth of the conflict" presented by OCDM's demand for frequencies (*infra*, pp. 11a-12a), the court below nevertheless allowed the Commission to defer its own independent judgment in the public interest at the behest of this claimant on the radio spectrum—thus enabling the government to take over sizeable portions of this natural resource without any genuine public interest determination being made.

The Act does not withdraw the situation at bar from the powers of the Commission and there is no evidence that Congress did not mean its broad delegation to carry the authority it so clearly expresses. Rather, it is precisely when, as here, the stakes are highest that independent administration of the public interest becomes paramount, and having the "responsibility of decision," the Commission "was not only at liberty but was required to reach its own conclusions upon the evidence." *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-86 (1933). To hold as the court did below that the demands of OCDM without more suffice for a major reshuffling of the radio spectrum, "would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress." *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 95 (1953).

This judicial excision of the Commission's statutory authority and attendant responsibility raises an important issue of public concern, for the legal framework for the development of radio in this "new era of scientific transition"[17] is of critical importance to the nation. The net effect of the decision below is that OCDM may take over and withdraw from the

[17] FCC, 24th Annual Report To Congress 25-28 (1958).

public domain a vital natural resource without being compelled to measure up to the public interest standard established by Congress for administration of the radio spectrum. Instead of such demands triggering the Commission into action as envisioned by Congress, the Court of Appeals has suffered the expert on radio matters to bow out unceremoniously.

### D. OCDM Cannot Interpose Claims of Governmental Privilege to Defeat Judicial Review of the Commission's Order When It Has Been the Moving Party Before the Commission.

As persons aggrieved and adversely affected by the Commission's order, petitioners have a right to seek a judicial determination of the lawfulness of that order. 47 U.S.C. § 402; 5 U.S.C. §§ 1032, 1034; 5 U.S.C. § 1009; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933). An essential element of this right is the court's duty to review and make available to the parties the "whole record" which the Commission had before it. Authorities cited *supra*.

The Court of Appeals' decision defeats this right. For it holds that the record tendered as the legal foundation for the Commission's order may be withheld from the parties because of its classified nature, even though the privilege claimant was the moving party before the Commission. This ruling raises a serious and important issue of fundamental concern to the administrative process never before presented to this or any other court. There has been a marked increase in the use and reliance on classified information in administrative proceedings.[18] If government

[18] Only the Atomic Energy Commission, however, appears to have promulgated procedures designed to protect both private and governmental rights whenever this occurs. See 10 Code Fed. Regs. § 2.800 *et seq.* (1959).

agencies may invoke claims of privilege to thwart judicial review of agency action, a new avenue is open to administrative lawlessness.

In ascertaining the bounds of such a claim in another context, this Court expressed its disapproval of a government agency invoking a claim of privilege at the same time that it is the moving party as was OCDM here. *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953). Thus, the government itself concedes that these are "substantial questions," to be resolved "in a manner which will protect both the rights of the parties and the national security interests." (JA 214-15)

## CONCLUSION

For the foregoing reasons, petitioners request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14650

BENDIX AVIATION CORPORATION, BENDIX RADIO DIVISION, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

AERONAUTICAL RADIO, INC., and AIR TRANSPORT ASSOCIATION OF AMERICA, *Intervenors*.

Appeal From An Order Of The
Federal Communications Commission

No. 14693

AERONAUTICAL RADIO, INC., a corporation, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

Petition to Review and Set Aside an Order of the
Federal Communications Commission

Decided November 13, 1959

*Mr. Daryal A. Myse* for appellant in No. 14650.

*Mr. Joseph DuCoeur*, with whom *Messrs. Donald C. Beelar* and *John E. Stephen* were on the brief, for petitioners in No. 14693.

*Mr. Max D. Paglin*, Assistant General Counsel, Federal Communications Commission, with whom *Mr. John L.*

*Fitzgerald*, General Counsel, Federal Communications Commission, and *Mrs. Ruth V. Reed*, Counsel, Federal Communications Commission, were on the brief, for appellee in No. 14650 and respondent Federal Communications Commission in No. 14693. *Mr. John Conlin*, Counsel, Federal Communications Commission, also entered an appearance for appellee in No. 14650 and respondent Federal Communications Commission in No. 14693. *Mr. Richard A. Solomon*, Attorney, Department of Justice, with whom *Mr. Henry Geller*, Attorney, Department of Justice, was on the brief, for respondent, United States of America, in No. 14693. *Mr. Daniel M. Friedman*, Attorney, Department of Justice, also entered an appearance for respondent, United States of America, in No. 14693.

*Mr. Donald C. Beelar*, with whom *Messrs. Joseph Du-Coeur* and *John E. Stephen* were on the brief, for intervenors in No. 14650.

Before WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

DANAHER, *Circuit Judge*: The Commission on April 16, 1958, adopted without prior notice, and on April 18, 1958, released, its Memorandum Opinion and Order[1] effecting immediate changes in its Rules. Many bands of frequencies were reassigned, some to be reserved exclusively for Government use, some exclusively for non-Government use and others on a shared basis. We are here concerned with two such bands, one involving frequencies in the 420-450 Mc band, and the other touching frequencies in the 8500-9000 Mc band. We will discuss only so much of the problem presented and the questions involved as we deem basic and essential to our conclusions.

Bendix Aviation Corporation (herein Bendix) on May 9, 1958, sought authorization for experimental use of the 430 Mc frequency in two of its aircraft for the develop-

[1] 23 FED. REG. 2676 (1958).

ment of an airborne aircraft collision avoidance system. Its petition was dismissed and reconsideration was denied. Bendix appealed[2] and here challenges the Commission's action in case No. 14650.

Air Transport Association of America and Aeronautical Radio, Inc. (herein ARINC/ATA) filed a pleading in support of the Bendix application. These parties, Bendix and others before the Commission had sought reconsideration of the Commission's April 16, 1958 Order, but all reconsideration was denied by the Commission's Order released July 31, 1958.[3] In case No. 14693 ARINC and ATA insist that the Commission's termination of the 8500-9000 Mc band for use in radionavigation with its consequent availability to exclusive use by the Government for "radiopositioning"[4] is invalid. By our order of October 16, 1958, these cases were consolidated.

The restrictions in the use of the spectrum were initiated by a request from the Office of Defense Mobilization (ODM)[5] acting, as the Commission said, in behalf of the

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[2] Bendix under Section 5.253(b) of the Rules also filed a petition in support of proposals submitted by ARINC/ATA. Pursuant to Section 5.253(f) Bendix requested the Commission to authorize an experimental grant of limited duration to operate a collision avoidance system on 430 Mc as described in its May 9, 1958, application *supra*. See 47 C.F.R. § 5.253(d) and (f) (1958). The Commission's denial of this separate petition under § 5.253(e) is also the subject, in part, of the Bendix appeal.

[3] 17 PIKE & FISCHER RADIO REG. 1588 (1958).

[4] As a phase of its action the Commission amended various parts of its Rules, in particular here adding a new definition in Part 2, Subpart A of the term "Radiopositioning" which reads:

"The determination of position or direction by means of the constant velocity or rectilinear propagation properties of Hertzian waves for purposes other than the navigation of ships or aircraft, or other than warning of obstructions to navigation." 47 C.F.R. § 2.1 (1958).

[5] Since July 1, 1958, reorganized as the Office of Civil and Defense Mobilization, pursuant to Executive Order 10773, 23 FED. REG. 5061 (1958).

Executive Branch of the Government. The representations submitted by ODM bore a security classification and the material has not been made public pursuant to Executive Order 10501[6] and Section 4(j) of the Communications Act[7] which in pertinent part reads: "The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense."

The Commission based its action on representations by ODM that the "reallocation of frequency bands for Government use are stated to be essential to fill radio positioning requirements which have increased significantly in recent years due to the international political climate and the advent of the 'space age'"; "that the requirements in question cannot be accommodated in frequency bands presently allocated for Government use"; and that redesignation of bands for exclusive use by Government services must be made "at this time." Accordingly, because of the urgency and nature of the Government's requirements and "because of the vital national defense considerations involved," the Commission made its public interest determination that its Rules be amended immediately to permit the orderly satisfaction of national defense requirements. The Commission further found that in view of such necessities and the vital national defense factors which it concluded were here compellingly involved, it was impracticable and contrary to the public interest to comply with the public notice requirements of Section 4 of the Administrative Procedure Act.[8]

[6] 18 FED. REG. 7049 (1953).

[7] 47 U.S.C. § 154(j) (1952).

[8] 5 U.S.C. § 1003 (1958). Pertinent language therein reads: "Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States . . .

(a) General notice of proposed rule making shall be published in the Federal Register . . . except . . . in any situation in which

Appellant and petitioners alike have attacked the Commission's failure to comply with the public notice provisions of the section.

## No. 14650

Some three weeks after the Commission had ordered the denial of non-Government access to the 420-450 Mc band, Bendix applied for experimental use of the 430 Mc frequency to develop a device for the prevention of mid-air collisions between aircraft. That such airborne electronic equipment is highly necessary may be assumed, especially where so many competent authorities, Government representatives and industry spokesmen alike, seem to have united in their efforts to devise a system to reduce the collision hazards which are a matter of common knowledge. The Commission also was clearly cognizant of the public interest character of the Bendix objective. In issue is the determination by the Commission that the Government need is paramount and vitally transcends non-Government use of the frequencies here involved, even assuming the very substantial public interest in and need for an airborne collision avoidance system. That determination is challenged on several grounds.

Bendix claims that under 47 U.S.C. § 309 it was entitled either to a grant or to a hearing. But when the Bendix application was filed, the frequency of 430 Mc had already been withdrawn from the field of non-Government use except as the Commission authorized temporary use of the frequency until February 15, 1963,

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the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

for radio altimeters[9] and for amateur service. Even amateur use was to be permitted on a limited power basis and then only on condition that it not cause harmful interference to the radiopositioning service[10] as defined in the amended Rules.[11] Thus Government use for radiopositioning was already exclusive with the exceptions noted, when Bendix filed its May 9, 1958, application. Contrary to the argument of Bendix, we conclude the Commission's action was not in derogation of the Act or of the Commission's Rules touching experimental authorizations, for frequency 430 Mc simply was no longer available for any such purpose as was disclosed by the Bendix application.

But, Bendix argues, to permit an allocation of the requested frequency for substantially exclusive Government use for radiopositioning is in conflict with treaty obligations of the United States. Prior to the April 16, 1958 Order, the 1947 Atlantic City Convention[12] had provided for international use of the band 420-450 Mc for aeronautical radionavigation and amateur services, with two

[9] 47 C.F.R. § 2.1, Subpart A (1958), defines an altimeter station thus:

"A radio navigation mobile station, in the aeronautical radionavigation service, the emissions of which are intended to determine the altitude of the aircraft, aboard which the altimeter station is located, above the earth's surface."

[10] 47 C.F.R. § 2.104(a)(5) and notes, US 41, US 18, US 104. As will be seen, we believe the amendments to the Rules to have been within the scope of authority legally delegated, and the existence of facts to justify its specific exercise must be presumed, in the light of the Commission's findings. U.S. v. Rock Royal Co-op, 307 U.S. 533, 567, 568 (1939); Thompson v. Consolidated Gas Co., 300 U.S. 55, 69 (1937); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

[11] See note 4 *supra*.

[12] International Telecommunication Convention, October 2, 1947, 63 STAT. 1399, T.I.A.S. No. 1901.

footnotes appended. Atlantic City Footnote 210, subject to the limitation in Footnote 211, accorded priority in this band to aeronautical radionavigation with the requirement that other services admitted to the band not cause harmful interference to the priority service. Atlantic City Footnote 211 provided for Region 2 (which includes the United States), that the allocation for aeronautical radionavigation is *temporary* and exclusively for *altimeters*.

Conformably thereto, the Commission's Rule, 47 C.F.R. § 2.104(a)(5) adopted and applied the treaty provisions, with added footnotes US 11, in effect, permitting aeronautical radionavigation service, *i.e.*, altimeters, to use the band 420-460 Mc only until February 15, 1963, and US 18 limiting the power to be utilized by the amateur service. That same rule, as amended agreeably to the April 16, 1958 Order simply spelled out that "radio altimeters" were not to be permitted to use the band 420-460 after February 15, 1963, and that amateur service was not to cause harmful interference to the radiopositioning service. Such requirements and limitations not only conformed to the Radio Regulations annexed to the Atlantic City Convention but to the applicable provisions of the Buenos Aires Convention of 1952, (T.I.A.S. No. 3266). Except for such limited use and services, the amended rule by US 104 thereafter precluded non-Government service.

The Bendix argument on the treaty aspect must fall. The Commission's Order did not allocate the 430 Mc frequency to radiopositioning. Subject to the exceptions noted, to repeat, it *denied non-Government access* to the 420-450 Mc band. Whatever *assignment* of the permitted Government use was to be made depends upon action by the President. If the withdrawn band is to be assigned to radiopositioning, that decision is *his* responsibility, devolving upon him not only as Chief Executive, but ex-

pressly by virtue of Section 305.[13] Thus, Government radio stations so operating pursuant to such assignment, do not come within Sections 301 and 303 of the Act and are not subject to Commission jurisdiction.

Moreover the Commission's amended Rule did not exclude amateur access to the band, and expressly provided that *nationally*, the treaty-permitted aeronautical radionavigation service is to be temporary and exclusively for altimeters. We need not stop to explore the full import of Article 22[14] of the International Telecommunication Convention, Buenos Aires, 1952, the preamble of which fully recognized "the sovereign right of each country to regulate its telecommunication." Article 48 thereof provided that "Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval and air forces." Bendix can take nothing from the treaty which represents the agreement of our Government. Action, if and when taken pursuant to the Convention in behalf of our Government, must be by the President as Chief Executive,[15] and we fail to see how in any respect his action here is contrary to our international obligations. Our review authority extends only to decisions and orders of the Commission.[16] One of the prime purposes of the Act is for "national de-

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[13] 47 U.S.C. § 305 (1952). The Commission's order denying reconsideration specifically noted that the "allocation of these bands to the radiopositioning service has been pursuant to Presidential authority under Section 305 and not by the Commission." Congress is quite aware of the "dual system." See S. Rep. No. 1854, to accompany S.J. Res. 106, 85th Cong., 2d Sess. (1958).

[14] Article 22 provides: "This convention shall abrogate and replace, in relations between the Contracting Governments, the International Telecommunication Convention of Atlantic City (1947)." [1955] 6 U.S.T. & O.I.A. 1242, T.I.A.S. No. 3266.

[15] Cf. Chicago & So. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[16] 47 U.S.C. § 402 (1952).

fense,"[17] and as to all channels of communication not preempted by the Government, licenses are required.[18] Government stations, as we have noted, are specifically exempted by Section 305. Channels of communication subject to Government control, use and assignment clearly are not available to the public. The United States is a party here and has appeared through its attorneys in support of the position of the Government as it had sought to meet the requirements of national defense. We must presume the Director of the Office of Defense Mobilization acted for the President as did the Secretary of War in *Wilcox* v. *Jackson*[19] with respect to a military need. Similarly, reservation of waters for a public purpose was upheld even against the claim of a state, in *Winters* v. *United States*.[20] We conclude that the Commission pursuant to the exercise of the prerogative of the Executive correctly conformed its Rules to accommodate the national defense requirements as the Convention permitted.

Bendix says, though challenged, that its experimental device possesses transmitting characteristics precisely similar to those of an altimeter, and accordingly the Commission's action in denying a hearing was arbitrary. Again our appellant overlooks the effect of the Commission's Order. The Commission found that the Government need is paramount. It simply ruled in effect, that even if the Bendix device be an altimeter, there is to be no further permitted use of a frequency which the Government through the President acting in his Constitutional capacity and pursuant to Section 305, has assigned to meet a vital national defense need for radiopositioning.

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[17] *Id.* § 151.

[18] *Id.* § 301; and see Nat. Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[19] 38 U.S. (13 Pet.) 496, 512 (1839).

[20] 207 U.S. 564 (1908); and see United States v. Walker River Irr. Dist., 104 F. 2d 334 (9 Cir. 1939).

Upon reconsideration sought by all parties, the Commission noted that its April 16, 1958 Order in no way adversely affected the later Bendix application for even under the Commission's Rules prior to the Order, the intended use could not have been licensed consistently with the international table. We need not so decide as we construe the predicate for the action. Taking special note of the Bendix claims in this particular, the Commission reiterated in its July 30, 1958 Order the position it had originally adopted thus:

> "The ODCM [*sic*] has determined that the band 420-450 Mc is the *only one* which can *feasibly* be made to serve the *Government radiopositioning requirement* that must be fulfilled in this portion of the spectrum. Therefore the *national defense consideration being paramount*, the Commission adheres to the position taken in the April 16 Order with respect to the band." (Emphasis supplied.)

It remains, then, for us to examine the authority for the Commission's initial action. As here pertinent, we turn to Executive Order 10460, June 16, 1953, reproduced in the margin,[21] which provides for the "Performance by the Director of Defense Mobilization of Certain Functions Relating to Telecommunications."

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[21] 18 FED. REG. 3513 (1953).

EXECUTIVE ORDER 10460

Providing for the Performance by the Director of Defense Mobilization of Certain Functions Relating to Telecommunications

By virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

Section 1. The Director of Defense Mobilization shall assist and advise the President with respect to the following-described telecommunications functions and such other telecommunications functions as the President may designate:

(a) Coordinating the development of telecommunications policies and standards applying to the executive branch of the Government.

We have fully appreciated the importance of the issue. We do not question that Bendix is competent and qualified. We recognize the depth of the conflict between the demands of the Executive on the one hand and of private but important non-Government entities on the other. Various possibilities of abuse can be conjured were we to speculate, but we cannot assume and there is no slightest suggestion of record, that there has been a "per-

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(b) Assuring high standards of telecommunications management within the executive branch of the Government;

(c) Coordinating the development by the several agencies of the executive branch of telecommunications plans and programs designed to assure maximum security to the United States in time of national emergency with a minimum interference to continuing nongovernmental requirements.

(d) Assigning radio frequencies to Government agencies under the provisions of section 305 of the Communications Act of 1934, as amended (47 U.S.C. 305), and establishing policies and procedures governing such assignments and their continued use.

(e) Developing United States Government frequency requirements.

Section 2. The Director of Defense Mobilization shall, to the maximum extent feasible, perform his functions with the aid, or through the facilities, of appropriate departments and agencies of the Government; and he shall establish such interagency committees and working groups composed of representatives of interested departments and agencies, and consult with such departments and agencies, as may be necessary for the most effective performance of his functions.

Sec. 3. The Interdepartmental Radio Advisory Committee shall report to and assist the Director of Defense Mobilization in the performance of his functions as he may request.

Sec. 4. Nothing in this order shall be deemed to impair any existing authority or jurisdiction of the Federal Communications Commission. The Director of Defense Mobilization shall cooperate with the Federal Communications Commission on problems of mutual concern.

Sec. 5. The records, property, personnel, and funds used, held,

version of the Commission's administrative processes for an improper purpose."[22] On the contrary, the action complained of reflects compliance with the position of the Executive taken in the national interest. A reading of the terms of Executive Order 10460 demonstrates its harmonious accommodation to emergencies which Congress in writing the Communications Act must have foreseen. Thus tested the Commission's action, pursuant to Sections 1, 4(i), 4(j), and 303(c), (f), (g) and (r) of the Act, was authorized.

National trust and responsibility must be reposed somewhere and in this situation, by Section 305 of the Communications Act and otherwise, they are centered in the President with all his vast power.[23] He is the Commander in Chief.[24] That the national emergency declared

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employed, available, or to be made available in connection with the functions vested in the Telecommunications Advisor to the President by Executive Order No. 10297 of October 9, 1951, entitled "Providing for a Telecommunications Advisor to the President" shall be transferred, consonant with law, to the Office of Defense Mobilization.

Sec. 6. The said Executive Order No. 10297 is hereby revoked.

DWIGHT D. EISENHOWER
The White House,
June 16, 1958.

The exercise of the Director's authority under Executive Order 10460 is not here affected by Executive Order 10773, 23 FED. REG. 5061 (1958).

[22] Federal Broadcasting System, Inc. v. FCC, 96 U.S. App. D.C. 260, 267, 225 F. 2d 560, 567, *cert. denied*, 350 U.S. 923 (1955).

[23] U.S. CONST. art. II, § 1 provides in part: "The executive Power shall be vested in a President of the United States of America."

[24] *Id.* § 2. And compare 47 U.S.C. § 606 (1952) which in circumstances specified, expands the President's authority to reach and control even already licensed stations and facilities.

in Proclamation No. 2914[25] has occasioned continued and still present concern is public knowledge.

Bendix, substantially on the grounds treated, has attacked the Commission's denial of its requested experimental license authority,[26] despite the fact that the frequency it sought was no longer available for non-Government use.[27] We are satisfied that the challenged action of the Commission must be sustained and accordingly, the dismissal of the Bendix applications and the denial of reconsideration were proper.

*No. 14650 Affirmed.*

No. 14693

The petitioners here seek review of the Commission's Order[28] released July 31, 1958 denying reconsideration of the April 16, 1958 Order with the consequent amendment of the Commission's Rules pertaining to the 8500-9000 Mc band.[29] The petitioners argue invalidity on substantially the grounds we have already discussed. Yet some different treatment is indicated as will be noted.

Actually, the conflict centers around the frequency 8800 Mc, as included within the 8500-9000 Mc band which had been made available according to the Atlantic City Convention for "worldwide" use in radionavigation.[30] Con-

[25] 15 Fed. Reg. 9029 (1950).

[26] Its request pursuant to the provisions of 47 C.F.R. § 5.253 (1958), *supra* note 2, perforce was addressed to the Commission's discretion.

[27] Cf. U.S. v. Storer Broadcasting Co., 351 U.S. 192, 202-204 (1956).

[28] *Supra* note 3.

[29] At the same time the Commission amended its Rules to permit non-Government licensing of dopplers on the frequency 13000 Mc.

[30] 47 C.F.R. § 2.1 (1959) defines radionavigation: "Radiolocation intended solely for the determination of position or direc-

formably thereto, the Commission's Rules prior to the April 16, 1958 Order had provided nationally for the radionavigation service with shared use between Government and non-Government.

Pursuant to the April Order the Rules as amended, but applicable to the United States only, provided that the band 8500-9000 Mc was allocated to exclusively Government use for radiopositioning, subject to temporary Government and non-Government sharing in accordance with US Footnote 120 which reads:

> "In the band 8750-8850 Mc, Government and non-Government airborne doppler radars in the aeronautical radionavigation service may be authorized temporarily until moved to a frequency band allocated to the aeronautical radionavigation service, and meanwhile must accept any harmful interference that may be experienced from the radiopositioning service."

The pleadings show that for several years much developmental effort had been undertaken in the doppler navigation field, indeed, prior to the April Order many licenses had already been issued by the Commission authorizing use of the 8800 Mc frequency by doppler radar equipment.[30] Among the petitioners operating in air trans-

tion or for obstruction warning, in navigation." The similar treaty definition was not altered by the Buenos Aires Convention, *supra* note 14. See 47 C.F.R. § 2.601, reference T.I.A.S. No. 1901, and 47 C.F.R. § 2.602, *id.*

[30] Pan American World Airways, Inc., one of the petitioners, was alleged to be at the time of the Order, the licensee of six aircraft doppler-navigation stations authorized to operate on the frequency 8800 Mc. The Commission tells us in its brief that such licenses had been issued "subject to cancellation without hearing in the event interference is caused to regularly authorized facilities, or if, in the judgment of the Commission, continued developmental operation would be, for any other reason, contrary to the public interest." We have scoured the record but find no pleading, exhibit or testimony which discloses the terms of any such condition. Many foreign flag air carriers were using dopplers on the 8800 Mc frequency, as the Commission was aware.

portation over domestic and international routes are Pan American World Airways, Inc., Trans World Airlines, Inc. and United Airlines, Inc., which either had already installed under license, or were committed to the installation of, airborne doppler equipment to operate in their aircraft on the 8800 Mc frequency. Petitioner, Bendix Aviation Corporation, was engaged in the development and manufacture of such equipment. Petitioner, Aeronautical Radio, Inc., ARINC, is an aeronautical communications agency for air carriers and others, and petitioner, Air Transport Association of America, ATA, is an association of air carriers. Both of the latter petitioners provide information, guidance and coordination on radio frequency engineering and otherwise render service with respect to the technical characteristics of aeronautical radionavigation devices for use in air transportation. These petitioners have vigorously contested the future down-grading of the 8800 Mc frequency from its treaty-permitted primary status which would continue to be available to foreign flag carriers, but not to petitioners except upon a temporary basis pending removal to another band. Meanwhile, because of US Footnote 120, domestic non-Government users must accept such harmful interference as may be occasioned by Government use of the frequency for radiopositioning. It is clear that their concern has not been alleviated by the Commission's further amendment of its Rules so as to permit the licensing of dopplers on the 13000 Mc frequency.

The Commission in its July 31, 1958 Order took account of the problem of the petitioners even as it sought to meet the national defense requirement for an exclusive allocation for radiopositioning subject to US Footnote 120 so far as the band 8750-8850 Mc was affected. The Commission said:

> "The Commission anticipates that the regular licensing of dopplers at 8800 Mc will continue until the Commission finds the state of the art permits the

transition to the 13000 Mc band and until such time as the Commission finds equipment can be made available in that band. At such time as the present licensing policy under US 120 is modified, the Commission will, to the greatest extent possible, endeavor to provide a reasonable amortization period. This policy will be followed because, at the time of the April 16 Order, the Commission had already licensed airborne dopplers at 8800 Mc in accordance with the provisions of its Rules and there was no licensing availability in the Rules for 13000 Mc doppler equipment. The Commission has today modified its Rules so as to permit the licensing of 13000 Mc dopplers. The Commission expects the aviation industry will make diligent efforts to exploit the 13000 Mc allocation for airborne doppler equipments."

We are satisfied that the Commission, confronted by the demands of the Executive for exclusive use of the frequency in question, had thus undertaken to do whatever was reasonably open to it in the light of national defense needs. Our earlier discussion demonstrated our conviction that the Commission possesses the authority to modify its Rules to accommodate the requirements of the Government itself. The field in which Government need for radiopositioning was deemed paramount involved interdepartmental expertise and the exercise by the President through OCDM of decisional prerogatives which had not been entrusted to the Commission by the Act.

When petitioners and their constituents prior to the April 16, 1958 Order had expended developmental effort with respect to the 8800 Mc frequency they assuredly knew that their operations contemplated the use of a Government and non-Government shared band. We perceive no basis for an assumption on their part that they were to be protected against interference by Government operations[32] or even against interference from each other.

[32] A pleading of record submitted by General Precision Laboratory suggests that in excess of one thousand 8800 Mc Government dopplers were available or in use.

The Commission did not terminate domestic access by radionavigation services to the center frequency of 8800 Mcs. The Commission's amended Rule in no way whatever impinged upon our Government's treaty obligations to foreign signatories utilizing that frequency for radionavigation, as permitted by the Atlantic City Convention. Footnote US 120 specifically looked to *continued* sharing of the band, subject only to t. requirement that users accept any harmful interference that may be experienced from the radiopositioning service. Petitioners' arguments based upon treaty commitments must fall.

Petitioners would say that the Commission's action was arbitrary and capricious. Granted the necessity for meeting essential national defense requirements, we fail to see how the Commission had any other alternative. The Executive had demanded that all potential users of the frequency in question be put upon immediate notice that at some future date the 8800 Mc frequency was to be exclusively Government. Meanwhile, the Commission made available to the aeronautical radionavigation service the 13000 Mc frequency. These very petitioners as is disclosed in the testimony of their undoubtedly qualified witnesses in docket No. 11866 had recognized the availability of a 13000 Mc frequency and had given it their support.

Our files contain a stipulation of the parties that the record certified by the Commission to us be supplemented with additional material. Counsel for the petitioners did not concede that information on file with the Commission in docket Nos. 11866 and 11997 was here relevant to the Commission actions, but we believe it was. Such investigations by the Commission are clearly authorized by the Act.[33]

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[33] 47 U.S.C. § 403 in pertinent part reads:

"The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized

We have studied all of the record as so supplemented. As early as November 9, 1956, the Commission had released its preliminary notice of hearing in docket No. 11866, issue 13 of which read: "What are the requirements for the radio navigation service for spectrum space above 890 Mc?" An order of inquiry in docket No. 11997 had been released April 11, 1957.

ARINC in its statement of proposed evidence for docket No. 11997, in addition to expressing its intention to present as witnesses representatives of ATA, also specified the inclusion of ARINC testimony in docket No. 11866. That the witnesses were looking to the future as well as reviewing the past history of development of air carrier transportation, was dramatically emphasized:

> "To illustrate, a DC-4 flying 8 hours a day will generate approximately 85,512 available seat miles. A DC-8, flying the same number of hours per day, will generate 467,000 available seat miles per day, a ratio of nearly 5-½ DC-4's to each one DC-8. . . . [T]wo such aircraft will give the available lift in passengers now . . . equal to the Queen Mary. I think that is a good comparison. It is a little staggering when you think of that, but it is all in the matter of speed."

That flight equipment must be inextricably bound up with the expansion of commercial air travel over the next seven or eight years was demonstrated to the Commission. That development of aeronautical radionavigation equipment to its utmost efficiency went hand in hand with such expansion was conclusively established, the Commission might well have found. That airborne doppler navigation aids are importantly linked with jet air speeds in such an enhanced volume of air traffic, the Commission could not have failed to notice.

to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter."

The secret word underlying the conflict between the petitioners and the Government is "interference." Aircraft in vast numbers flying at a speed of hundreds of miles per hour attempting to utilize constricted flight areas present a problem, not merely of airlanes and airports but of telecommunication and electronic safety equipment, the Commission could readily have seen. The problem in part has been faced by Congress in the Federal Aviation Act of 1958.[4] H.R. Rep. No. 2360 tells us:

> "The magnitude and critical nature of the problem came first to general public notice, perhaps, as a result of the midair collision of two airliners over Grand Canyon on June 30, 1956, when 128 lives were lost. Following this disaster were fatal air crashes between civil and military aircraft operating under separate flight rules established in the Civil Air Regulations."[5]

Another phase of the common problem is that presented by the record here which discloses that the petitioners have sought an interference-free frequency upon which to operate the radio navigation equipment to which they are committed. In the light of the claims of the petitioners the Commission noted:

> "The ODCM [*sic*] has advised the Commission that the relief requested by petitioners again cannot be reconciled with the national defense requirements in this area of the spectrum. The loss of any significant portion of spectrum space in the 8500-10000 Mc region would make the radiopositioning service inoperative at major defense installations. Further, under the circumstances, it is the judgment of the Commission that it would not be in the public interest for two vital services, radiopositioning, and aeronautical radio-

[4] Act of August 23, 1958, 72 Stat. 737, 49 U.S.C.A. § 1301 (1952).

[5] 2 U.S. Code Cong. & Ad. News, 85th Cong., 2d Sess., pp. 3741-42 (1958).

navigation, one involving the security of the nation and the other the safety of life, to utilize the same frequency band on a permanent basis. Because we deem the Government's requirements in this portion of the spectrum to be paramount we must adhere to our previously announced decision with respect to these frequencies."

The Commission further observed:

"However, should we eventually learn that it is unlikely that interference will occur, the aviation industry should not then be reluctant to accept this condition [US 120 *supra*]. . . .

"If, on the other hand, we eventually learn that interference is likely to occur, the interference condition provision in US 120 becomes most pertinent, and the reason for retaining it is self-evident."

We are persuaded that the position of the Commission is eminently reasonable and in no respect arbitrary and capricious, as petitioners would have us say.

The petitioners have complained of their being denied access to the material furnished by OCDM to the Commission upon the basis of which the national defense requirements were placed before the Commission. They moved to supplement the record before us that such material might be reviewed by this court. We ordered that the material be transmitted to us but that it be impounded under seal subject to examination by us should we decide that examination is required. A claim of privilege was lodged with us by the Director of the Office of Civil and Defense Mobilization in the Executive Office of the President. A pertinent paragraph from his sworn "claim" reads:

"I have actually and personally examined and considered exact mimeographed copies of the documents which are the subject of the motion, the originals being in the custody of the Federal Communications Commission, and I find that the documents sought

could not be furnished without seriously jeopardizing the capability of the military services to defend the nation because they would reveal information upon which a potential enemy could readily develop effective countermeasures to this country's defense, would disclose highly secret and technical communications charts and tables, and would disclose plans for the assignment of United States Government frequencies necessary to meet requirements essential to the maximum security of the United States in time of national emergency. These findings are concurred in by the Department of Defense as indicated in the affidavit attached hereto [that of Deputy Secretary of Defense, Donald A. Quarles]."

We are satisfied that the claim of privilege must be honored, particularly in the light of the provisions of Executive Order 10501.[36] Moreover, it is not essential that we examine the classified material since, for reasons previously advanced, we have concluded that the exercise of the prerogative of and by the Executive must control.[37]

Since we find no abuse by the Commission of its authority, the petition will be

*Dismissed.*

[36] *Supra* note 6.

[37] To what extent the authority of the President in making assignments of frequencies under § 305 of the Act is to conflict with the exercise by the Commission of its authority under other sections of the Act poses another problem for Congress. It is enough for the courts that what the Commission has done is not subject to successful attack here.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Communications Act are as follows—

Section 1, creating the Federal Communications Commission, provides:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. 47 U.S.C. § 151.

Section 303, detailing the Commission's powers, provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (f) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the

larger and more effective use of radio in the public interest;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party. 47 U.S.C. § 303(e)(g)(r).

Section 305, exempting certain government-owned stations from Commission licensing, provides:

(a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this title. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe.

(b) Radio stations on board vessels of the United States Maritime Commission or the Inland and Coastwise Waterways Service shall be subject to the provisions of this title.

(c) All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Commission. 47 U.S.C. § 305.

## TREATY PROVISIONS INVOLVED

The pertinent treaty provisions are as follows—

**International Telecommunication Convention, Buenos Aires T.I.A.S. No. 3266 (1952)**

ARTICLE 45

1. All stations, whatever their purpose, must be established and operated in such a manner as not to result in harmful interference to the radio services or communications of other Members or Associate Members or of recognized private operating agencies, or of other duly authorized operating agencies which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations.

2. Each Member or Associate Member undertakes to require the private operating agencies which it recognizes and the other operating agencies duly authorized for this purpose, to observe the provisions of the preceding paragraph.

3. Further, the Members and Associate Members recognize the desirability of taking all practicable steps to prevent the operation of electrical apparatus and installations of all kinds from causing harmful interference to the radio services or communications mentioned in paragraph 1 of this article.

**International Radio Regulations, Atlantic City, T.I.A.S. No. 1901 (1947)**

Ch. III, Art. 3, §§ 1-5

§ 1 The countries, members of the Union, adhering to these Regulations, agree that in assigning frequencies to stations which, by their very nature, are capable of causing harmful interference to the services rendered by the stations of another country, they will make such assignments

in accordance with the table of frequency allocations and other provisions of this chapter.

§ 2 The frequencies so assigned shall be selected in such a manner as to avoid causing harmful interference with services carried on by stations using frequencies assigned to them in conformity with the provisions of this chapter and which are entitled to international protection from harmful interference as provided in article 11.

§ 3 A country, member of the Union, shall not assign to a station any frequency in derogation of either the table of frequency allocations given in this chapter or the other provisions of these Regulations, except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations.

§ 4 The stations of a service shall use frequencies so separated from the limits of a band allocated to that service as not to cause harmful interference to the services to which the frequency bands immediately adjoining are allocated.

§ 5 Where a band of frequencies is allocated to different services in adjacent Regions or sub-Regions, the basic principle is the equality of right to operate. Accordingly, the stations of each service in one Region or sub-Region must operate so as not to cause harmful interference with services in the other Regions or sub-Regions.

## Ch. III, Art. 5

§ 5. The allocation of frequency bands to the several services is shown in the following table:

• • •

| Frequency Band and (Bandwidth) Mc/s | Allocation to Services | | | |
|---|---|---|---|---|
| | World Wide | Regional | | |
| | | Region 1 | Region 2 | Region 3 |
| 8500-9000 (1300) | Radio-navigation 116) 117) | | | |

Atlantic City Footnotes

230 (116) The band 9 300-9 320 Mc/s is designated for racons.

231 (117) In the band 8 500-9 800 Mc/s shipborne radar in merchant ships is confined within the band 9 320-9 500 Mc/s.

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No. 625

# In the Supreme Court of the United States

OCTOBER TERM, 1959

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–21a) has not yet been reported. The decisions and orders of the Federal Communications Commission (J.A. 13–46, 182–198) have not been officially reported but are unofficially reported at 17 Pike & Fischer Radio Regulation 1505, 1587.

### JURISDICTION

The judgment of the court of appeals was entered on November 13, 1959. The petition for a writ of

certiorari was filed on December 31, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The Federal Communications Commission amended its rules to provide that certain radio frequencies, previously shared by government and non-government users for radionavigation, were henceforth to be available to non-government users on a temporary basis only. It concluded that public interest considerations of national defense and safety of life and property required the amendment in the light of representations by the Office of Civil and Defense Mobilization ("OCDM") that the frequencies were needed for vital defense facilities of the Federal government, and the availability of other frequencies which could be assigned for the exclusive use of the radionavigation stations affected.

The following questions are presented:

1. Whether the Commission's action violated a treaty to which the United States is a party.

2. Whether the Commission abused its discretion in relying upon the OCDM representations as to national defense needs, in determining that the public interest would be served by amending its rules in the manner indicated.

3. Whether the court of appeals properly denied petitioners access to certain classified material, furnished by OCDM to the Commission, that set forth the national defense considerations involved.

## STATUTES AND TREATIES INVOLVED

The pertinent provisions of the Communication Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) and of the International Telecommunication Convention, Buenos Aires 1952 (T.I.A.S. No. 3266), in addition to those set forth in the Petition (pp. 22a–26a), are set forth in the appendix, *infra*, pp. 16–19.

## STATEMENT

Prior to April 16, 1958, the 8500–9000 megacycle (Mc) band of the radio spectrum had been shared by government and non-government users for radionavigation purposes[1] (47 C.F.R. 2.104(a)(5), 1958 ed.; J.A. 188). On that date, the Commission amended its Table of Frequency Allocations to limit the access to the band by the non-government users subject to its authority (J.A. 13–46).[2] It did so by deleting the provision in the Table allocating the band to non-government radionavigation use and substituting, in lieu thereof, footnote US 120, which provides (J.A. 24):

> In the band 8750–8850 Mc/s, Government and non-Government airborne doppler radars in the aeronautical radionavigation service may be

[1] Government users had operated in this band pursuant to authority granted by the President under Section 305 of the Communications Act of 1934 and the non-government users pursuant to Commission authority under Sections 301 and 303 of the Act. See *infra*, pp. 9, 12–13.

[2] Although the Commission's order made a number of changes in the Table of Frequency Allocations (J.A. 18–46), only changes in the 8500–9000 Mc band are here challenged. The Commission's actions relating to the 420–450 Mc band were challenged below in a separate appeal, consolidated with the instant proceeding for briefing and argument. (Case No. 14650, C.A.D.C.)

authorized temporarily until moved to a frequency band allocated to the aeronautical radionavigation service, and meanwhile must accept any harmful interference that may be experienced from the radiopositioning service.

At the same time the Commission adopted a Notice of Proposed Rule Making (23 F.R. 2698) proposing, *inter alia*, to make the frequency band 13,250–13,400 Mc available for radionavigation use by non-government stations.

The Commission acted on the basis of a request by the Office of Defense Mobilization [3] ("OCDM"), acting on behalf of the President,[4] which stated that vital national defense considerations required the President to assign these frequencies to government users to meet increased radiopositioning requirements (J.A. 14–15, 183–184).[5] Because of the likelihood of mutually harmful interference between high-power government and non-government operations in the affected frequency bands, OCDM requested the Commission to place immediate limitations upon non-government use of these frequencies in order to permit their effective

[3] This agency is now called the Office of Civil and Defense Mobilization, and will be referred to as "OCDM."

[4] By Executive Order 10460 of June 16, 1953 (18 F.R. 3513), the Director of OCDM is responsible, *inter alia*, for advising and assisting the President with respect to his telecommunication functions under Section 305 of the Communications Act, and is directed to "cooperate with the Federal Communications Commission on problems of mutual concern."

[5] As defined by the Commission (J.A. 21), radiopositioning is the "determination of position or direction * * * for purposes other than the navigation of ships or aircraft, or other than warning of obstructions to navigation."

use by the President (*ibid.*). Since the OCDM request bore a security classification, it has not been made public. Executive Order No. 10501 (18 F.R. 7049); Section 4(j) of the Communications Act of 1934 (J.A. 184).[4]

Upon the basis of these representations concerning national defense requirements, and taking into account non-government needs for radio frequencies, including those described in the records of two pending comprehensive Commission fact-finding proceedings involving future allocation of frequencies (J.A. 184, 187), the Commission ruled that the defense requirements were paramount and that "it would be in the public interest to amend its Rules to permit the orderly satisfaction of those requirements" (J.A. 17). Because of the "urgency and nature of the Government requirements and the vital national defense considerations involved," the Commission found it "impracticable and contrary to the public interest" to comply with the notice requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. 1003), and ordered the amendments to its Rules to become effective immediately (J.A. 17, 186).

Thereafter, petitioners filed a "Petition to Reconsider and Vacate Certain Parts" of the Commission's April 16 Order. They urged particularly that the band 8750–8850 Mc was necessary for the development of self-contained airborne "doppler" radar for navigational use in civil aircraft, and that the new

[4] Section 4(j) (47 U.S.C. 154(4)(j)) authorizes the Commission "to withhold publication of records or proceedings containing secret information affecting the national defense."

restriction against permanent non-government use of the band should be removed despite a "risk" of interference between government and non-government operations (J.A. 194, 60–61). The Commission denied reconsideration and reaffirmed its earlier order (J.A. 182–198).

Again concluding (J.A. 194–198) that the government's requirements in this portion of the spectrum were paramount and that the public interest required adherence to the rule change, the Commission stated (J.A. 194–195):

> The OCDM has advised the Commission that the relief requested by petitioners again cannot be reconciled with the national defense requirements in this area of the spectrum. The loss of any significant portion of spectrum space in the 8500–10000 Mc region would make the radiopositioning service inoperative at major defense installations. Further, under the circumstances, it is the judgment of the Commission that it would not be in the public interest for two vital services, radiopositioning, and aeronautical radionavigation, one involving the security of the nation and the other the safety of life, to utilize the same frequency band on a permanent basis.

While emphasizing (J.A. 196) that its determination against permanent authorization of civil dopplers at 8800 Mc was "predicated on the fundamental allocation premise regarding the undesirability of sharing vital national defense and airborne safety functions in the same frequency band," the Commission took account of the practical problems facing petitioners

(J.A. 197). Thus, in view of the fact that the Commission had already licensed a "limited number" of dopplers at 8800 Mc in accordance with the provisions of its previous allocation,[7] and that the new 13250–13400 Mc band for dopplers was only then being made available[8] and no equipment for its use then existed, the Commission stated it "wish[ed] to emphasize that there will be no discontinuance of licensing availability in this band [8800–9000 Mc] for airborne doppler equipments as long as US 120 remains in the Rules" (*ibid.*). It stated that it "anticipated" that regular licensing of dopplers at 8800 Mc would continue until the state of the art and the availability of equipment permitted a transition to the 13,000 Mc band and that at that time the Commission would "to the greatest extent possible" endeavor to provide a reasonable amortization period (*ibid.*).

Following the filing of petitions for review, the Commission certified to the court of appeals the public record of the proceedings, but stated that it was withholding the classified material submitted to it by OCDM. Petitioners moved the court to require the Commission to supplement the record with the classified material (J.A. 212–214). The Government opposed the motion, filing in connection therewith a claim of privilege by the Director of OCDM (J.A.

[7] The Commission noted (J.A. 194, 195, n. 9), however, that petitioners had not selected the 8800 Mc band for development of doppler equipment until March 1958, less than six weeks before the rules were amended.

[8] The Proposed Rule to make 13250–13400 Mc available for the non-government users (see p. 4, *supra*), was made final on July 30, 1958 (23 F.R. 6111).

216–218), supported by an affidavit of the Deputy Secretary of Defense (J.A. 218–219). After oral argument at a pre-hearing conference, Judge Danaher directed that the classified material be transmitted to the court, but upon condition that it be sealed and placed securely in the Clerk's office "to be available to the division before which the review proceedings shall come on to be heard, or before the court as the case may be * * *" (J.A. 227–229).

The court of appeals unanimously affirmed the Commission's orders (Pet. App. 1a–21a). Holding that the Communications Act gives the Commission "authority to modify its Rules to accommodate the [frequency] requirements of the Government" (Pet. App. 16a, 8a–9a, 10a–13a), the court found no abuse of such authority in the Commission's action limiting the availability of frequencies in the 8500–9000 Mc band for non-government radionavigation use (Pet. App. 17a–21a). The court expressly held that "[t]he Commission's amended Rule in no way whatever impinged upon our Government's treaty obligations * * *." (Pet. App. 17a). It likewise rejected petitioners' contention that the Commission's acceptance of the representations of OCDM as to defense needs invalidated the Commission's determination that the public interest would be served by restricting non-government use of the 8500–9000 Mc band in order to aid the national defense and promote safety of life. (Pet. App. 16a–20a). Finally, the court refused (Pet. App. 20a–21a) to make the classified material available to petitioners since (1) the claim of privilege "must be

honored" and (2) the court in any event found it "not essential that we examine the classified material."

## ARGUMENT

1. Contrary to petitioners' contention (Pet. 8–10), the Commission's action in this case did not violate the provisions of any radio treaty to which the United States is a party.

The argument rests upon a basic misconception of what the Commission did. The Commission did not, as petitioners mistakenly assume, itself allocate the 8500–9000 Mc band to government radiopositioning. That allocation was made by the President, pursuant to his exclusive jurisdiction under Section 305 of the Communications Act to assign frequencies to radio stations or classes of stations "belonging to and operated by the United States." The sole action taken by the Commission was to limit the use of the frequency band by non-government licensees. It is this action of the agency in limiting non-government use of the frequency, and not the President's action in assigning it to government radiopositioning, that must be tested against the treaty standards.

The court of appeals was plainly correct in holding (Pet. App. 17a) that this action by the Commission "in no way whatever impinged upon our Government's treaty obligations to foreign signatories utilizing that frequency for radionavigation, as permitted by the" treaty involved (the International Telecommunication Convention, Buenos Aires 1952, T.I.A.S. 3266). The International Table of Frequency Allocations attached to that Convention (Chap. III, Article 5, Section 5

of the Radio Regulations, T.I.A.S. 1901) allocated the band 8500–9800 Mc on a world wide basis to radionavigation (with two footnote reservations not here relevant). (Pet. App. 26a). The Commission's amended Rule makes no allocation for the band 8500–9000 Mc except for the provision in Footnote US 120 that domestic non-government airborne doppler radars in the aeronautical radionavigation service may continue to use the band temporarily (J.A. 21, 24)—a use entirely consistent with the international allocation to radionavigation. The International Radio Regulations afford petitioners no right to use internationally allocated spectrum space where such use has not been authorized by the United States pursuant to its domestic laws. Here, as we have pointed out, the President has assigned the space to defense radiopositioning.[9]

2. There is no merit to petitioners' attack (Pet. 10–16) on the Commission's acceptance of the OCDM representations regarding national defense needs as a

[9] Although the President's action is not in accord with the frequency allocations of a subordinate provision (the International Radio Regulations) of the treaty, it is fully justified by the overriding provisions of the treaty itself (the Buenos Aires Convention (Art. 12(3), 19 and 48)). Under Article 19, Sec. 1 of the Convention, the United States is "bound to abide by the provisions of this Convention and the Regulations annexed thereto * * * except in regard to services exempted from these obligations in accordance with the provisions of Article 48 of this Convention." Article 48 provides that "Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval, and air forces." Since the President's action here dealt with "military radio installations" (see J.A. 217, 218–219), it comes within the exception of Article 48.

basis for its conclusion that the public interest required that non-government users be excluded from the 8500–9000 Mc band. Despite petitioners' broad statements (Pet. 10, 12) that the decision below authorizes the "unbridled" "presidential seizure of frequencies," the actual holding below was a narrow one. The Commission made the requisite statutory findings that eventual exclusion of private licensees from the frequency involved was in the public interest, and explained its reasons in detail (J.A. 194–197). The only question is whether, in making that determination, the Commission was warranted in accepting the OCDM representations as to the national defense considerations involved.

In the light of the representations by the OCDM as to the defense needs for use of the 8500–9000 Mc band, and the further fact that the 13000 Mc band could be made available for civilian radionavigation use, the Commission's determination that the government requirements were in this instance paramount and that the public interest would be served by making non-government access to the 8800 Mc band temporary is, as the court stated (Pet. App. 20a), "eminently reasonable and in no respect arbitrary and capricious." In making that determination, the Commission was fully warranted in accepting the representations of those responsible for the national defense as to national defense needs. Clearly the agency was not required, as petitioners apparently would have it do (Pet. 13–16), to make its own independent judgment as to the national defense requirements. See *Marbury* v. *Madison*, 1 Cranch

137, 164; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191; *Chicago & Southern Air Lines, Inc.*, v. *Waterman S.S. Corp.*, 333 U.S. 103, 111. The Commission's consideration was necessarily limited to the question whether governing public interest considerations required it to take allocation action in the light of the stated national defense considerations.

Petitioners' argument overlooks the fact, which the court of appeals recognized (Pet. App. 8a, n. 13; 21a, n. 37), that the Communications Act provides a dual system of frequency allocation by the President and the Commission. Each has independent authority to assign frequencies—the President for government use under Section 305, and the Commission for non-government use under Sections 301 and 303—and each may act independently of the other. Similarly, apart from the provisions of Section 606 giving the President broad allocation authority in time of war or upon proclamation of certain other types of "national emergency" (not here involved), neither the President nor the Commission can compel the other to refrain from using any frequency. Accommodation between these two co-equal authorities to prevent interference in the use of radio frequencies is, as Congress has long been aware, a matter of voluntary cooperation.[10] See

[10] In practice, by voluntary agreement with the Executive Branch, the Commission has the exclusive use of certain parts of the spectrum for its licensees, refrains from using other parts to permit exclusive government use, and shares much of the spectrum with the government. On these shared portions the Commission and the Executive Branch consult before making frequency assignments. *Twenty-Third Annual Report of the Federal Communications Commission* (1957), p. 41.

H. Rep. 2095, 78th Cong., 2d Sess., pp. 12–14; S. Doc. 53, 83d Cong., 1st Sess., p. 1; S. Rep. 1854, to accompany S.J. Res. 106, 85th Cong., 2d Sess., pp. 3, 4, 10, 13, 18; cf. A Report by the President's Communications Policy Board, *Telecommunications—A Program for Progress* (G.P.O. 1951), pp. 193–195.

The court below correctly held (Pet. App. 16a, 10a–12a) that the Commission has authority under Sections 1, 4(i), 4(j) and 303 of the Act to accommodate its frequency assignments to the requirements of the government where the Commission determines that it would serve the public interest to do so. The use of the radio spectrum to aid the national defense, along with promotion of safety of life and property in general, are among the stated purposes (in Section 1 of the Act) for which the Commission was created. The court's comments (Pet. App. 16a, 12a, 21a) as to Presidential prerogatives and responsibilities related to petitioners' contention, here renewed (Pet. 13–16), that the Commission abdicated its statutory responsibilities by relying on Executive representations as to national defense needs. As we have shown (*supra*, pp. 10–12), the court properly rejected that contention.

3. Finally, there is no merit in petitioners' contention (Pet. 16–17) that the court of appeals erred in declining to make available to them the classified material submitted to the Commission by OCDM. The formal claim of privilege of the Director of OCDM and the supporting affidavit of the Deputy Secretary of Defense (J.A. 216–218, 218–219) clearly

establish that "military secrets are at stake" (*United States* v. *Reynolds*, 345 U.S. 1, 6–11). The court of appeals was accordingly warranted in concluding (Pet. App. 21a) that the claim of privilege "must be honored".

Moreover, petitioners were not prejudiced by not having access to the classified material. For the only issue relating thereto appropriate for judicial review was the legality of the Commission's reliance upon the national defense representations. Either the Commission was authorized to accept them (as the court below held, without itself finding it necessary to examine the classified material (J.A. 214)), or it was not. The answer to that question, however, does not turn upon the contents of the classified material, but upon the scope of the Commission's authority.

## CONCLUSION

The decision of the court of appeals is correct, there is no conflict of decisions, and no questions warranting further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1960.

# APPENDIX

Additional pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), are as follows:

## TITLE I—GENERAL PROVISIONS

* * * * * *

### PROVISIONS RELATING TO THE COMMISSION

* * * * * *

SEC. 4.

* * * * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * * *

## TITLE III—SPECIAL PROVISIONS RELATING TO RADIO

### PART I—GENERAL PROVISIONS

#### LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any

other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

Additional pertinent provisions of the International Telecommunication Convention, Buenos Aires, 1952 (T.I.A.S. No. 3266), are as follows:

ARTICLE 12—REGULATIONS

* * * * * *

3. In case of inconsistency between a provision of the Convention and a provision of the Regulations, the Convention shall prevail.

* * * * * *

ARTICLE 19—EXECUTION OF THE CONVENTION AND REGULATIONS

1. The Members and Associate Members are bound to abide by the provisions of this Convention and the Regulations annexed thereto in all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries, except in regard to services exempted from these obligations in accordance with the provisions of Article 48 of this Convention.

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ARTICLE 48—INSTALLATIONS FOR NATIONAL DEFENCE SERVICES

1. Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval and air forces.

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No. 625

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

AERONAUTICAL RADIO, INC., ET AL., *Petitioners*

*v.*

UNITED STATES OF AMERICA

and the

FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS

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February 11, 1960

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The central premise of the government's opposition brief is that the Federal Communications Commission did not actually do what its order says it did. Thus, the government attempts to shift responsibility for the Commission's order onto the President in order to clothe it with the raiment of executive privilege. (Opp. Br. p. 9). But the record is clear that the President neither authorized nor directed the Commission to undertake the frequency reallocation at issue in this case. Moreover, the Office of Civil and Defense Mobilization could not have done so on the

President's behalf as the Court of Appeals erroneously "presumed" because OCDM simply does not have authority to allocate or reallocate radio frequencies. (see Pet. pp. 12-13)

It is for this reason that the government's brief conveys the false impression that presidential action is being contested here even though the record is equally clear that petitioners have not objected to the assignment of the frequencies in controversy to government stations either for treaty authorized radionavigation devices or for non-treaty radiopositioning stations. Indeed, petitioners specifically urged before the Commission that it was technically feasible for the 8800 mcs band to be shared by government and non-government users alike. (JA 61)

What petitioners do challenge is the Commission's termination of treaty allocations and the resulting destruction of rights intended to be secured under both statutory and treaty law. For if the Commission may validly terminate treaty allocations, as approved by the court below, all rights of licensed access to the radio spectrum are condemned to agency caprice. This is so because the allocation process, *i.e.*, the division of the radio spectrum among authorized classes of service, *e.g.*, radionavigation, broadcasting, is prerequisite to the licensing process, *i.e.*, the assignment of discrete frequencies to particular stations. Since the Commission will not consider applications, grant station licenses, or renew outstanding station licenses which do not conform with approved frequency allocations, it follows that the power to cancel an allocation carries with it the destruction of all rights of licensed use of that portion of the radio spectrum. (see Pet. pp. 4 n. 1, 8)

Finally, the opinion of the Court of Appeals amply corroborates petitioners' contention that by disclaiming responsibility for the consequences of its order and by denying its statutory obligation to make an independent public interest determination the Commission has stripped itself of the regulatory authority enacted by Congress. The court's repeated references to the President's prerogatives as chief executive and commander in chief, as well as to the national emergency, belie the "two co-equal authorities" argument pressed by the government in opposing certiorari. (Opp. Br. p. 12) These references are intelligible only as the basis upon which the court filled the regulatory void caused by the Commission's default by extending the President's authority beyond Section 305 of the Communications Act to encompass civilian as well as governmental uses of the radio spectrum.

Respectfully submitted,

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